

JUL 31 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID BARRIOS,

Defendant - Appellant.

No. 07-50453

D.C. No. CR-06-00005-LAB

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Submitted July 22, 2008<sup>\*\*</sup>

Before: B. FLETCHER, THOMAS, and WARDLAW, Circuit Judges.

David Barrios appeals from the 57-month sentence imposed upon remand following his guilty-plea conviction for importation of cocaine, in violation of 21

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

U.S.C. §§ 952 and 960. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Barrios contends that the district court erred by denying him a minor role adjustment under U.S.S.G. § 3B1.2(b), because he was substantially less culpable than his co-participants and he lacked the mental capacity to be anything other than a minor participant. We conclude that the district court did not err. *See United States v. Lui*, 941 F.2d 844, 849 (9th Cir. 1991) (holding that substantial amounts of narcotics is grounds for refusing to grant a sentence reduction); *see also United States v. Howard*, 894 F.2d 1085, 1088-89 (9th Cir. 1990).

Barrios also contends that the government breached the plea agreement by arguing on appeal that the district court did not err in refusing to grant him a minor role adjustment and that the government is estopped from taking this position on appeal. We conclude that a plain reading of the plea agreement demonstrates that the government is not bound to any position regarding a minor role adjustment on appeal. *See United States v. Schuman*, 127 F.3d 815, 817-18 (9th Cir. 1997) (per curiam) (concluding no breach of the plea agreement where agreement did not specify that the government would move for a downward adjustment).

Barrios's remaining contentions lack merit.

**AFFIRMED.**